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CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1949

No. 8[redacted]101

SOUTH WESTERN RAILROAD COMPANY, ET AL.,
Petitioners,

vs.

L. O. BENTON, JR., ET AL.,
Respondents.

Petition for Writ of Certiorari to Supreme Court of Georgia

and Brief In Support Thereof

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No.....

SOUTH WESTERN RAILROAD COMPANY, ET AL., *Petitioners* vs. L. O. BENTON, JR., ET AL. *Respondents.*	PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

South Western Railroad Company (hereafter called South Western), Anton P. Wright, Andrew J. Lyndon, and Wallace Miller, Central of Georgia Railway Company (hereafter called Central), and Merrel P. Callaway, as trustee of the properties of the Central of Georgia Railway Company (hereafter called Trustee) respectfully petition that writ of certiorari may issue to the Supreme Court of Georgia to bring up the record from and to review the judgment of that court rendered April 10, 1950, in the case of South Western Railroad Company, et al., Plaintiffs in Error, vs. L. O. Benton, Jr., et al., Defendants in Error, No. 16980, and that judgment in said case may be reviewed and reversed, and in support of this petition respectfully show:

JURISDICTIONAL STATEMENTS

This Court has jurisdiction to grant the writ of certiorari under U. S. Code Title 28, Sect. 1257 (3),

in that said judgment of the Supreme Court of Georgia is a final judgment, and the Supreme Court of Georgia is the highest court of the State in which a decision could be had, and in its decision a State statute is drawn in question on the ground of being repugnant to the contract clause of the Constitution of the United States, and a claim of right under a statute of the United States is denied, to-wit, under Section 5 of the Interstate Commerce Act.

THE QUESTIONS INVOLVED

The decision of the Supreme Court of Georgia is erroneous in two vital respects.

(1) First, on the constitutional question, in holding that the Act of the General Assembly of Georgia of March 10, 1933 (Georgia Laws 1933, p. 325), now codified as Sections 94-328 and 94-329 of the Code of Georgia of 1933, authorizing a sale by South Western of its properties with the assent of the holders of a majority of its stock, was in violation of Article I, Section 10, Paragraph 1 of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts, in that said Act of March 10, 1933, impaired the obligation of a contract contained in the charter of the South Western granted by the State of Georgia in 1845 (Georgia Laws 1845, p. 132); and in holding that the said Act of 1933 was void because it made a fundamental change in the charter of South Western; and that, therefore, South Western could not sell its properties without unanimous consent of its stockholders.

(2) Second, the Supreme Court of Georgia in its judgment also held that it would not leave South Western and its officers free to join the Central in an application to the Interstate Commerce Commission

for authority and approval of the acquisition of the railroad properties of the South Western by Central under Section 5 of the Interstate Commerce Act, stating that the Supreme Court of the United States had virtually decided this question against petitioners in the decision of the case of *Merrel P. Callaway, Trustee vs. L. O. Benton, Jr., et al.*, 336 U. S. 132, 93 L. Ed. 443, the Supreme Court of Georgia saying:

> "The United States Supreme Court having once held that the question here presented is one for determination by the State court, and this Court having held that the trial court properly ruled that unanimous consent of stockholders of South Western was required under the State law for the sale of its franchises and properties to the reorganized Central, we will not assume that either the Interstate Commerce Commission or the United States Supreme Court would hold that the Commission would have the right to override and nullify the judgments of the State courts which were held to have jurisdiction to determine the question presented, or that the South Western and its officers could thus avoid, circumvent, and nullify the adjudication of this question by the State courts."

This judgment of the Supreme Court of Georgia, therefore, decided that it would require unanimous consent of South Western's stockholders to sell its properties and franchises to Central, and denied South Western's right to apply to the Interstate Commerce Commission under Section 5 (11) of the Interstate Commerce Act (Title 49, Sect. 5 (11), U. S. Code Annotated) for authority and approval of the acquisition of the properties of South Western by Central.

Petitioners duly excepted to both of these decisions in both the lower court and the Supreme Court.

The Act of March 10, 1933, as codified in Code sections 94-328 and 94-329, and the pertinent parts of Section 5 of the Interstate Commerce Act (Title 49, Sect. 5, U. S. Code Annotated), and original charter of the South Western Railroad, granted by special act of the General Assembly of Georgia on December 27, 1845 (Georgia Laws 1845, p. 132) are copied in the appendix of the supporting brief accompanying this petition.

So far as the two questions involved are concerned, there are no facts in dispute. The decree of the Superior Court of Bibb County, Georgia, from which the bill of exceptions was taken to the Supreme Court of Georgia, was rendered on the pleadings, no evidence having been taken in the case, all questions being raised by rulings on demurrer. (R. 140, 141, 142, 144, 145, 146, 147.)

STATEMENT OF THE CASE

1.

L. O. Benton, Jr. and Charles J. Haden, as stockholders in South Western, on behalf of themselves and others similarly situated, brought their petition in equity in the Superior Court of Bibb County, Georgia, on March 25, 1947, against South Western and its directors. (R. 1)

2.

The gravamen of this petition was that under the reorganization plan of Central it was proposed that the reorganized company should acquire by purchase the property of South Western for certain bonds to be issued by the reorganized company; that on March 28, 1947, the stockholders of South Western were to vote on the question of the acceptance or rejection of

the reorganization plan of the Central submitted to South Western by the Commission; and that South Western did not have any power to convey its properties under its charter, granted by the General Assembly of Georgia on December 27, 1845; and that Sections 94-328 and 94-329 of the Code of Georgia of 1933, on which South Western relied for power to convey its property, were inapplicable, but if applicable, the said Code sections, if applied to the South Western, would be unconstitutional, in that they would be in violation of Article I, Section 10, Paragraph 1 of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts, and also that provision of the Constitution of Georgia which provides that no law impairing the obligation of contracts shall be passed; that the properties of South Western could not be sold without the unanimous consent of its stockholders.

3.

The petition prayed that the meeting of the stockholders proposed to be held on March 28, 1947, should be enjoined, but that if the meeting was held and a mere majority of the stock should vote in favor of the acceptance of the plan and the resulting sale of the railroad, that the officers and directors of South Western should be perpetually enjoined from selling and conveying its property, or from performing any act in behalf of the South Western which would tend to consummate the reorganization plan of the Central with respect to the acquisition of South Western by Central (R. 21).

4.

The Interstate Commerce Commission had issued a ballot to South Western to vote whether it would accept or reject the plan of reorganization of Central.

The Superior Court of Bibb County did not enjoin the stockholders' meeting, so that the stockholders duly met and voted to accept the plan of reorganization, the vote for acceptance being 30,137 shares and against 9,057 shares out of a total of 51,911 shares, and South Western thereupon notified the Interstate Commerce Commission of its acceptance of the plan of reorganization.

5.

On April 18, 1947, Merrel P. Callaway, as trustee of the property of the Central, brought a petition in the United States District Court for the Southern District of Georgia (in which the reorganization proceeding of the Central was pending) against L. O. Benton, Jr., Charles J. Haden, and South Western, to enjoin the further prosecution of the suit in Bibb Superior Court, on the grounds that the United States Court had prior and exclusive jurisdiction of the subject matter of said suit, and that the Superior Court of Bibb County was without jurisdiction in the premises. On this petition the District Court issued, on April 18, 1947, a temporary restraining order against the plaintiffs in the suit in the State court.

6.

On April 24, 1947, the Judge of the Superior Court of Bibb County granted an interlocutory injunction in which the court held that South Western had no power under its charter to alienate its property and franchises, and that Code Section 94-328, if applied to South Western, impaired the obligation

> "of a contract between the State of Georgia, the incorporators (or stockholders) — which would include all the stockholders, and the public."

The court in said order enjoined the defendants from accepting the plan of reorganization, and from carrying into effect any provision for the sale of the properties of the South Western not authorized by unanimous vote of the stockholders of South Western; and the defendants were specifically enjoined from doing or performing any act on behalf of the South Western which might tend to consummate the plan of reorganization of the Central with respect to the acquisition of the properties of South Western (R. 43.). Exceptions to this order were preserved and error was assigned thereon in the bill of exceptions to the Supreme Court of Georgia. (R. 47.)

Callaway, as trustee of the debtor in the reorganization proceedings of the Central, amended his petition in the District Court on May 26, 1947, calling attention to the interlocutory injunction granted by the judge of the Superior Court of Bibb County, and prayed:

> (a) That said interlocutory injunction be declared null and void.
>
> (b) That the court adjudicate the question as to whether unanimous stockholder consent was necessary as a condition precedent to acceptance of the reorganization plan by South Western.

The United States District Court in due course granted a permanent injunction against the respondents and adjudged that said District Court had paramount and exclusive jurisdiction over the subject matter of the suit of L. O. Benton, Jr., in Bibb Superior Court, and that in the exigencies in which South Western was South Western had power to sell its property on the vote of a majority of its stock and to accept the plan of reorganization. Respondents to

the petition of the Trustee took an appeal to the United States Circuit Court of Appeals for the Fifth Circuit, and the decree rendered on the petition of Callaway, Trustee, was there reversed on January 13, 1948, the case being reported in 165 Fed. (2d) 877, as L. O. Benton, Jr., et al. vs. Merrel P. Callaway, Trustee, et al.

Callaway, Trustee, secured a writ of certiorari from this Court to the Court of Appeals for the Fifth Circuit, and on hearing of the certiorari by this Court, it affirmed, on February 7, 1949, the judgment and decision of the Fifth Circuit Court of Appeals. The decision of this Court is reported as Merrel P. Callaway, as Trustee vs. L. O. Benton, Jr., et al., 336 U. S. 132, 93 L. Ed. 443.

7.

Central and Callaway,* as Trustee, intervened as defendants in the State court suit of L. O. Benton, Jr., et al.

8.

The material portions of the final decree rendered December 5, 1949 by the Superior Court of Bibb County, Georgia (R. 184), which is affirmed by the Supreme Court of Georgia, are copied in the appendix of the brief accompanying this petition. The final decree is in substance the same in its terms as the interlocutory injunction granted by the Superior Court April 24, 1947 (R. 45, 46).

9.

The final decree prevented South Western from making application or joining in an application with the Central to the Interstate Commerce Commission under Section 5 of the Interstate Commerce Act for

*These Intervenors contended that South Western had power to sell under Code Sections 94-311 and 94-318, as well as Code Sections 94-328 and 94-329, but in view of the decision of the Court, it is unnecessary to consider Sections 94-311 and 94-318.

authority to Central to acquire the railroad properties of South Western.

10.

South Western, Central, and Callaway, Trustee, requested the Superior Court of Bibb County to modify its interlocutory injunction so that South Western might be free to make an application to the Commission under Section 5 of the Interstate Commerce Act, and further requested the Superior Court that, if on final decree the court should hold that South Western had no power to convey its railroad properties without unanimous stockholder consent, the final decree should leave South Western and its officers free to join with Central in an application to the Commission for authority and approval of the acquisition of the properties of South Western by Central (R. 110, 105.)

11.

The Superior Court struck on demurrer the amended answer of South Western raising this question (R. 145), and also struck on demurrer the amended intervention of Central and Callaway, Trustee (R. 146).

Petitioners duly excepted pendente lite to this ruling of the trial court (R. 157, 167) and in their bill of exceptions to the Supreme Court of Georgia (B.E. 20, 24).

BASIS UPON WHICH IT IS CONTENDED THAT THIS COURT HAS JURISDICTION.

Federal Constitutional Question.

The statutory provision which is believed to sustain the jurisdiction of this Court is United States Code, Title 28, Section 1257 (3).

The Respondents, Plaintiffs in the trial court, appealed to the Constitution of the United States and

claimed that the Act of the General Assembly of the State of Georgia approved March 10, 1933, (Georgia Laws 1933, p. 235), impaired the obligation of the contract with them set out in the charter of South Western in violation of Article I, Section 10, Paragraph 1 of the Constitution of the United States.

The Supreme Court of Georgia held that Act to violate the Constitution of the United States, and the judgment of the Supreme Court was based upon that holding.

The Respondents also asserted that said Act impaired the obligation of the contract in violation of Article I, Section 3, Paragraph 2, of the Constitution of the State of Georgia (Georgia Code Ann. Section 2-305), but in holding that this Act did impair the obligation of the contract, the Supreme Court of Georgia did not declare its independence of the decisions of the Supreme Court of the United States though the State constitutional provision had identity of scope with the relevant clause of the United States Constitution.

The Supreme Court of Georgia did not place its decision upon any adequate non-federal ground. It based its decision in this case upon its construction of the United States Constitution and of the decisions of the United States Courts thereon. Neither in this case nor in any other case has the Supreme Court of Georgia held that it could, or would, give the provision in the State Constitution as to the impairment of the obligation of contract any construction different from the construction given by the Supreme Court of the United States to that provision in the United States Constitution. In this case the Supreme Court of Georgia was construing the provision of the United States Constitution and cited the decisions of the United States Courts thereon, and its reasoning was evidently in sup-

port of an erroneous construction of that provision. and it did not decide the case upon any ground independent of the federal question and, if it had put forward non-federal grounds, they would have been plainly untenable and would have rested upon no fair or substantial basis.

All the Georgia cases cited by the Supreme Court of Georgia in its decision, with reference to impairment of the contract, referred to the Contract Clause of the Federal Constitution. At the time these decisions were rendered there was no clause in the Constitution of Georgia as to impairment of contracts. The Contract Clause did not appear in the Georgia Constitution until the Constitution of 1877.

The Constitution of the State of Georgia is subordinate to the Constitution of the United States. The Constitution of Georgia, Article XII, Sec. I, Pars. I and II (Code of Georgia, Sections 2-8001 and 2-8002).

If this Court should decide there is no contract or that the contract was that the Corporation might convey its property with the consent of the State, that would be conclusive of the whole case. The Contract Clause of the State Constitution is a law of the State. If that Clause of the State Constitution is applied by the Supreme Court of Georgia to nullify the Act of March 10, 1933, and the right of South Western to sell its property on a majority vote as authorized by that Act, then the Contract Clause of the State Constitution would impair the obligation of the contract contrary to the Contract Clause of the Federal Constitution.

Questions Involved Under Section 5 of Interstate Commerce Act.

Also, there was drawn in question in this case the validity of a statute of the United States, to-wit, Sec-

tion 5 of the Interstate Commerce Act, and the title, right and privilege of South Western was specially set up by petitioners and claimed under said statute of the United States, and the judgment and decision of the Supreme Court of Georgia was against the validity of said statute of the United States and denied the title, right, and privilege set up and claimed.

The final decree of the trial court in this case prevented South Western from making application or joining in an application with Central to Interstate Commerce Commission under said Section 5 of the Interstate Commerce Act for authority for the Central to acquire the railroad properties of South Western. Petitioners requested the trial court to modify its interlocutory injunction and so frame its final decree that it should leave South Western and its officers free to join with Central for an application to the Commission for authority and approval of the acquisition of the properties of South Western.

The trial court refused this, and the Supreme Court of Georgia affirmed, holding that the Supreme Court of the United States had virtually decided this question against petitioners in the case of Merrel P. Callaway, Trustee, vs. L. O. Benton, Jr., 336 U. S. 132, and moreover it was not to be assumed that either this Court or the Interstate Commerce Commission would set aside the judgment of the Supreme Court of Georgia deciding that it required unanimous consent of stockholders to sell the properties and franchises of South Western.

Under Section 5 (11) of the Interstate Commerce Act the jurisdiction of the Commission is, as to this matter, exclusive and plenary, and under said Section and paragraph, if the Commission finds that the ac-

quisition is in the public interest, South Western is authorized to convey its property to Central, notwithstanding that under the law of Georgia unanimous consent of stockholders may be necessary to a sale; and the power granted by said Section and paragraph is deemed to be in modification of the powers of South Western under its corporate charter or under the laws of the State of Georgia.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The Supreme Court of Georgia has decided the federal questions in this case, which are questions of substance, in a way we think not in accord with the applicable decisions of this Court, as appears from the decisions cited herein and in the supporting brief.

The State Court has decided a federal question of substance, in holding that the Act of March 10, 1933, impaired the obligation of a contract, when there was, in fact, no contract that the properties and franchises of South Western should not be conveyed without unanimous consent. This puts South Western in a position where it can never, from a practical standpoint, either sell its property or make a long lease of it, the charter being a perpetual charter.

There is no decision, either of this Court or any other Court, to support the proposition that under the circumstances of this charter, the Corporation would never have the right to sell its property without unanimous consent, when relieved by the State of the inability of all quasi public corporations to sell their franchises without the consent of the State. See particularly—***Railroad Commission v. Eastern Texas Ry. Co.***, 264 U. S. 79.

The state court has decided a federal question of substance in holding that when the state court has decided that a railroad corporation may not sell its property without unanimous consent of its stockholders, that corporation cannot join with another railroad corporation in application to the Interstate Commerce Commission under Section 5 of the Interstate Commerce Act for authority for the acquisition of its properties and franchises by the other corporation. Petitioners believe that this is contrary to the decisions of this Court in the following cases:

Callaway vs. Benton, 336 U.S. 132, 140, 141.

Seaboard Air Line Ry. Co. vs. Daniels, 333 U.S. 118.

Schwabacher vs. U. S., 334 U.S. 182.

C.C.C. & St. L. Ry. Co., 25 U.S. 275 U.S. 404.

New York Central Securities Co. vs. U. S., 287 U.S. 12, 26, 27.

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Palmer, Trustee vs. Massachusetts, 308 U.S. 79.

Smith, Trustee, vs. Hoboken R. Co., 328 U.S. 123.

Thompson, Trustee vs. Texas-Mexican R. Co., 328 U.S. 134.

There is no requirement in Section 5 of the Interstate Commerce Act as to the vote of stockholders to authorize the application to the Commission. The Commission passes on the application and if it is in the public interest, then the corporation is relieved from seeking the approval of any State authority and from all restrictions, limitations and prohibitions of State or Federal law and the powers granted by the Act result in a modification of the power of the Corporation under its corporate charter or under the laws of the State.

This Petition is accompanied by a certified transcript of the record in the Supreme Court of Georgia, including the proceedings in that court in the case of South Western Railroad Company, et al., Plaintiffs in Error, vs. L. O. Benton, Jr., et al., Defendants in Error, No. 16980, and ten additional copies thereof. A supporting brief is attached hereto.

WHEREFORE, Petitioners pray that a writ of certiorari may be directed to the Supreme Court of Georgia, to bring up the record in said case and to review the decision of that court in said case, and that the judgment of the Supreme Court of Georgia therein may be reversed and set aside.

This 25 day of May, 1950.

Respectfully submitted,

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Brief In Support of Petition for Certiorari.

There are no facts in dispute here. The judgment was rendered on the pleadings. The Charter of South Western is copied in the Appendix.

FIRST AS TO THE CONSTITUTIONAL QUESTION.

I

Under the Contract Clause of the Federal Constitution this Court will determine for itself whether there be a contract, whether its obligation has been impaired, and will also determine for itself the meaning and application of the State Constitutional or Statutory Provisions said to Create the Contract, or by which it is Asserted an Impairment has been effected.

Coombs v. Getz, 285 U.S. 434, 441, (citing many cases).

Phelps v. Board of Education, 300 U.S. 319.

Higginbotham v. Baton Rouge, 306 U.S. 535.

II

The Contract Clauses of the Federal and State Constitutions are identical in scope, and if this Court decides that no contract has been impaired, this decision will be conclusive, and no State question will be left in the case.

(a) If the question whether the contract has been impaired arises under both the State and Federal Constitutions, the decision of the question by this Court will determine the whole case and there will not be any State question left for decision.

The State Constitution acknowledges the supremacy of the Federal Constitution over it. (Art. XII, Sec. I, Pars. I and II; Code Sections 2-8001, 2-8002).

The two Constitutions operate in the same field as to the State of Georgia, and as the Federal Constitution is supreme, the decision of the Supreme Court of the United States as to whether there has been any impairment of the contract is necessarily conclusive, because otherwise there would be two conflicting authorities in the same field on precisely the same question. The question is fundamentally and finally a Federal question.

(b) While the decision of the Supreme Court of Georgia concludes that the contract is impaired under both constitutions, it could hardly, without being inconsistent, decide otherwise as the Contract Clauses of both Constitutions are identical.

But in arriving at its decision the State Court relied mainly on decisions of the Supreme Court of the United States. The few State Court decisions on

which the Georgia Supreme Court relied in this case, were all cases which turned on the Contract Clause of the Federal Constitution and not on the Contract Clause of the State Constitution. All of the relevant State decisions cited were decided before 1877. A Contract Clause appeared in the State Constitution for the first time in the Constitution of 1877. Not a single relevant decision cited referred to the Contract Clause of the State Constitution.

(c) If this Court decides that the Act of 1933 does not impair the contract and then the Supreme Court of Georgia decides that under the Contract Clause of the State Constitution the Act of 1933 does impair the contract, the Supreme Court of Georgia would thereby apply the Contract Clause of the State Constitution (which is a law of the State) to destroy the right of sale vested in the South Western and the Contract Clause of the State Constitution would thus impair the obligation of the contract contrary to the Contract Clause of the Federal Constitution.

III

The franchises of a railroad company are not alienable without legislative consent.

Singleton v. South Western R. Co., 70 Ga. 464, 467.

5 *Cook on Corporations* (8th Ed.), Sections 892, p. 4180, 893, pp. 4194, et seq.

13 *Fletcher Cyc. Corps.* Section 5801, pp. 119, 120.

This is a power which the State has reserved and which it may relax whenever it chooses. The fact that the State has reserved this power does not result in or constitute any contract between the State and the Corporation, or between the stockholders and the Corporation, or between the stockholders themselves.

IV

The Act of March 10, 1933, codified in Code Sections 94-328, 94-329, was passed for the relief of South Western and the other leased lines of Central.

These Code Sections are copied in the Appendix to the brief, and are hereinafter referred to as the Act of 1933.

Although South Western and the other leased lines of Central are not mentioned in the Act, it was passed to relieve them from the predicament they were in (R. 41, 67). The Act is definitely a remedial Act.

V

There is no contract between the Corporation and the State, or between the Stockholders inter sese, or between the Corporation and its Stockholders that they will never, except with unanimous Stockholder consent, sell the properties and franchises of the Company and liquidate the Company no matter what the exigencies of the Company may be, if the State should give its consent to sell.

(a) No time is fixed for the expiration of the Charter. It is, therefore, a perpetual Charter.

I Morawetz on Private Corps. (2nd Ed.) Section 411.

(b) The Act of 1933 is compatible with the Contract Clause of the Constitution and the State clearly has the reserved power to give its consent to a sale as it has done by the Act of 1933.

Whatever interest the public might have in the continued ownership and operation of this property by South Western, constituted an obligation of South Western to the State, not an obligation of the State

to South Western. If the State should give its assent to a sale, this does not impair any obligation due by the State to South Western or its Stockholders. The Corporation and its stockholders must have some obligation due to them or there must be some contract between them before it can be said that the obligation of the contract is impaired.

The Corporation and its Stockholders were in a predicament. The Act of 1933 was an Act of relief to them. It has no element, whatever, of impairment in it.

No impairment of a contract can be spelled out of the fact that under the principles of municipal law, the properties and franchises of a quasi public Corporation cannot be sold without the consent of the State. The State clearly has the reserved power to give its consent, whenever it pleases.

The Supreme Court of Georgia in this case has decided in substance that the relaxation of the obligation due by the Corporation to the State is ineffectual because the minority stockholders have not consented to it. This is a wholly untenable proposition.

Such legislation as contained in the Act of 1933 is within the reserved power of the State.

A statute of the State of New York passed subsequent to a contract provided that interest should be added to recoveries in actions for unliquidated damages for breach of a contract. The contention was that the Statute impaired the obligation of the contract. The Court held at p. 166:

> "There was no provision in the contract with respect to the recovery of interest in case of

breach; that is either for or against such recovery. Thus the terms of the contract did not in themselves and apart from the applicable law create an obligation not to demand interest."

Funkhouser v. Preston Co., 290 U. S. 163.

The usual permissive charter of a railroad company does not give rise to any obligation on the part of the Company to operate at a loss, and in such a case, even without the consent of the State, it may abandon operations and dismantle the railroad.

Railroad Com. v. East Texas R. Co., 264 U.S. 79,85.

Brooks-Scanlon Co. v. R.R. Com. of La., 251 U.S. 396.

Bullock v. R.R. Com. of Fla., 254 U.S. 513.

Modifications of conditions of withdrawals of stockholders in a Building & Loan Association, upheld as within the reserved power of the State.

Vick v. South Ward Assn., 310 U.S. 32, 37.

Repeal of usury laws in effect at time of contract within the reserved power.

Ewell v. Daggs, 108 U.S. 143, 151.

Composition of claims of creditors of insolvent municipality.

Faitonte v. Asbury Park, 316 U.S. 503,

United States v. Bekins, 304 U.S. 27.

Material changes in remedies in foreclosure of mortgages in times of great emergency.

Home B. & L. Assn. v. Blaisdell, 290 U.S. 398.

East New York Savings Bank v. Hahn, 326 U.S. 230.

(c) The Supreme Court of Georgia substantially concedes in its opinion that there was no contract between the State and the Corporation that it would not sell its properties and franchises if the State consented; and put its decision squarely on the proposition that there was such a contract between the stockholders inter sese, and between the Company and its stockholders.

Counsel for Respondents in his brief in the Supreme Court of Georgia concedes that there was no such contract between the Corporation and the State, but contends that the contract was between the stockholders themselves and between the Company and its Stockholders. His brief says, referring to the Act of 1933:

> "All that Act can constitutionally do, and perhaps all that the General Assembly intended it to do, was to give the authority of the State (note particularly the language in it 'authorized to sell'), to a sale. The State simply said to the Corporation 'so far as your contract with us as contained in your charter is concerned, you may sell if your Board of Directors agree, and the holders of a majority of your stock assent'. The State did not and constitutionally could not impair the other parts of the contract; the contract between the stockholders and the corporations; the contract between the stockholders themselves."

There is no such contract expressed in the Charter; therefore, the theory must be that such a contract is implied. It is simply a case of "strong-armed" construction to say that the stockholders had a contract among themselves or with their Corporation, that the properties of the Company should never be sold and liquidated without unanimous consent no matter what the exigencies of their situation might be. It is in-

conceivable that the stockholders should have agreed that one stockholder could hold up a sale and liquidation no matter how expedient it might be. There is nothing real about any such construction, it is a forced and highly imaginary construction.

South Western has normally been a deficit line. It cannot operate its property. It has no equipment or facilities with which to operate. It is confronted with large expenditures for additions and betterments. It is now being operated by Central for account of South Western. (R. 70-72; R. 80).

South Western has over a thousand stockholders scattered all over the country (R. 15). Unanimous consent is impractical. If one stockholder can hold up the liquidation of this Company, then the probability is that it will eat its head off. If the minority stockholders win their case, they stand a good chance of losing their property.

(d) The presumption of law is that the State did not divest itself of power to relax this obligation of the Corporation to the State. The State is never presumed to divest itself of its powers. The presumption of law likewise is that the stockholders never intended to tie up themselves so that one stockholder could dictate their actions.

(e) The concession that the Act of 1933 did not impair the contract between the Corporation and the State seems to us to concede the case out of Court. If there is no contract between the State and the Corporation, by what process of ratiocination can it be that the stockholders themselves have such a contract between themselves and with the Corporation. The sale of the property of the Corporation is a corporate

function. The stockholders have no power of sale, they can act only through the Company and the Board of Directors. It seems to us to be a palpable contradiction to say that there is no contract between the Corporation and the State, but there is a contract between the stockholders themselves and between them and the Corporation.

VI

The following authorities are to the effect that where power to sell is conferred by an Act subsequent to the Charter, the Corporation can sell on the vote of a majority of the stock, and the subsequent Act does not impair the contract.

Inhabitants of Waldoborough v. Knox & L.R. Co., 84 Me. 469; 24 Atl. 942.

Lauman v. Lebanon Valley R. Co., 30 Pa. St. 42; 72 Am. Dec. 685.

Wilson v. Proprietors of Central Bridge, 9 R. I. 590.

Hinds County v. Natchez etc. R. Co., 85 Miss. 599; 38 So. 189.

Venner v. Atcheson T. & S.F.R. Co., 28 Fed. 581, 589.

Hinckley v. Schwarzchild & Sulburger Co., 94 N.Y. Sup. 357.

VII

When the State waived the reservation of the power of sale, the Corporation then occupied the same position as to the sale and liquidation of its affairs as any private corporation.

The Supreme Court of Georgia says that notwithstanding the State has waived its reservation of the power of sale, the Corporation is still a railroad corporation. That simply begs the question. The only

difference between a railroad corporation (which is a quasi public corporation) and the ordinary private corporation is that it is beyond the power of the former to alienate its properties and franchises and there is no such restraint on a private corporation. The only reason why it is beyond the power of a railroad corporation to make such a sale is because the State has withheld its consent. Therefore, when the State consents, there is no difference, whatever, in the power of sale of the railroad Corporation and any other corporation.

Morawetz states that a private company can sell and liquidate its property by a majority vote of stock, but that a quasi public corporation, like a railroad, cannot. In a footnote to Section 414 he states "If, however, the Legislature should discharge a railroad company from its obligations to the public, a majority would have the same powers as in case of other classes of corporations."

I Morawetz on Private Corporations (2nd Ed.) Sections 413, 414.

See also:

Hinds County v. Natchez, J. & C.R. Co., 85 Miss. 599; 38 So. 189, 191, 192.

Treadwell v. Salisbury Mfg. Co., 7 Gray 393.

Black v. Delaware Canal Co., 22 N.J. Eq. 130.

VIII

The law as it existed at the time of the Charter is impliedly a part of the contract.

Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685, 692.

Home B. & L. Assn. v. Blaisdell, 290 U.S. pp. 435, 436.

IX

At Common Law when this Charter was Granted (1845) an Ordinary Corporation could sell its Property and Franchises and liquidate on the vote of a Majority of its Stock.

There is a learned article on this question by Professor Edward H. Warren in Vol. 30, Harvard Law Review, p. 335 (1917), in which the cases are reviewed and in which the author concludes that at common law a corporation could sell all its property and liquidate itself (although it might be solvent at the time), on the vote of a majority of its stock. If this Court considers this question, it should read this article.

Blackstone, referring to 33 Henry VIII, c. 27, states the common law of England is that "any majority is sufficient to determine the act of the whole body." 33 Henry VIII, c.27, is copied in the Appendix to this brief. We refer to it because it states the common law of England as Blackstone states it.

I *Sharswood's Blackstone*, p. 478.

By the Act of February 25, 1784 (Cobbs Digest, p. 721) the common law of England and such of the Statute laws of England as are usually in force in the province of Georgia were declared to be in full force in Georgia.

Grimmett v. Barnwell, 184 Ga. 461, 464 (citing several cases).

All of the text writers concur in holding that a corporation can sell its property and liquidate on the vote of a majority of its stock.

I Morawetz on Private Corporations (2nd Ed.) Section 413.

Angel & Ames on Corporations (8th Ed.) p. 490.

I Kyd, p. 422.

Field on Corporations, Section 486, quoting Brice's Ultra Vires.

Elliott on Private Corporations (3rd Ed.) Section 600.

Boone on the Law of Corporations, Section 201.

The Supreme Court of Georgia concedes that the common law in Georgia is, as we contend it is, but evades the point by stating that South Western is a railroad corporation, altogether ignoring the fact that the only difference between a railroad corporation and an ordinary business corporation, in this respect, is that the former cannot alienate its franchises without legislative consent, and when legislative consent is granted, it is on the same plane as any other private corporation.

X

If the Act of 1933 does not impair the obligation of the Contract, it cannot be a fundamental change in the charter.

The Supreme Court of Georgia decided that the Act of 1933 wrought a fundamental change in the charter. If the Act of 1933 is an Act of relief, and the State had the right to pass it, and it did not impair any contract right of the stockholders or the Corporation, the Act would not be invalid on the ground that it wrought a fundamental change in the charter. If the State had the right to pass it and it did not impair any contract right, no constitutional rights were affected.

The original purpose of the Corporation is not destroyed. The railroad continues to exist in the hands of another owner. The amendment is merely incidental

and auxiliary. It can hardly be said to be a fundamental change, in the sense that it deprived the corporation of any right. It does just the contrary, it relieves it of a disability.

I Morawetz on Private Corporations (2nd Ed.) Section 413.

Angel & Ames on Corporations (8th Ed.) p. 490.

I Kyd p. 422.

Field on Corporations, Section 486, quoting Brice's Ultra Vires.

Elliott on Private Corporations (3rd Ed.) Section 600.

Boone on Law of Corporations, Section 201.

A case particularly in point, where a railroad corporation, which had a special charter, amended its charter by adopting the General Railroad Law, subsequently passed, and the Court held this was not a fundamental, radical or vital change in the charter.

Chattanooga R. Co. v. Warthen, 98 Ga. 599.

As to certain matters, doubtless Stockholders as between themselves have certain contract relations. There are many instances where the Courts have held that an increase of capital stock, an extension of a line of road, a material change in the business of the Corporation is a fundamental change which cannot be effected over the protest of a minority. The philosophy of this is that the enterprise in which the stockholders have agreed to embark, cannot be materially changed without affecting their rights with each other and with the Corporation. The question has often arisen in suits on stock subscriptions. There is no similarity in these situations to the case at bar.

XI

The Cases which rule that, merger or consolidation cannot be effected except by unanimous vote are not in point because no merger or consolidation is involved, and the stockholders of South Western do not receive stock in the reorganized Corporation.

Under the reorganization plan, the method of acquisition was to be through purchase, merger or consolidation as might be determined upon (R. 62). Under the order of the District Court the method determined upon was purchase (R. 65). The resolutions of the Directors of South Western in accepting the plan, authorized a sale and conveyance for *bonds* of the reorganized Corporation (R. 23, 24). The consideration under the plan was bonds (R. 63). The plan was submitted to South Western, not to its stockholders. (R. 64). The conveyance was to be made by the corporation and thereupon the Corporation was to liquidate and distribute its assets among its stockholders (R. 65).

The theory of the cases which hold that merger or consolidation or any arrangement whereby stockholders are forced to take stock in another enterprise impairs the obligation of the contract, is that by making the stockholder against his will an adventurer in an enterprise not contemplated by the original charter, the charter contract is thereby impaired.

The Supreme Court of Georgia did not distinguish this line of cases from the situation in the case at bar, but adopted them as applicable, which is clearly erroneous. We refer hereinafter to these cases on which the Court and Counsel for Respondent relied.

3 Cook on Corporations (8th Ed.), Section 671, states that a corporation cannot sell its property in exchange for stock of another corporation. But in the same section, p. 2620, it is stated that a sale for bonds is not open to the same objections as in the case of stock.

See also:

Forsyth v. Alabama etc. R. Co., 207 Ala. 488; 93 So. 401.

The Act of 1933 under which South Western acted, authorizes a sale and not a consolidation or merger.

XII

Under the exigencies which confront South Western it has power to sell all its property and liquidate on the vote of a majority of its stock.

The exigencies which confront South Western are set forth in the Intervention of Central (R. 70-73) and in the amended answer of South Western (R. 80).

The modern doctrine on this subject is summed up in:

Fletcher Cyc. Corporations, Section 5797 and Sections 2946, 2947.

Fletcher is supported by other textwriters:

Morawetz on Private Corporations (2nd Ed.) Section 413.

Noyes Intercorporate Relations (2nd Ed.) Sections 110 and 111.

Professor Warren in 30 *Harvard Law Review*, 335, 338.

3 *Cook on Corporations*, Section 670, p. 2602.

The leading case on this subject is:

Geddes v. Anaconda Copper Mining Co., 254 U.S. 590, 595, 597, 598.

Among the many other cases which sustain this proposition are the following:

Calnan v. Guaranty Security Corp., 271 Mass.; 171 N.E. 830.

Beidenkopf v. Des Moines Life Ins. Co., 160 Iowa 629; 142 N.W. 434.

Inhabitants of Waldoborough v. Knox & L.R. Co., 84 Me. 469; 24 Atl. 942.

Bassett v. City Bank & Trust Co., 116 Conn. 617; 165 Atl. 557.

Hinds County v. Natchez, J. & C.R. Co., 38 So. 189, 191, 192.

The exigencies referred to in the text books and authorities are not limited to insolvency, but cover all cases which make it expedient in the interest of the stockholders that the property should be sold and the corporation liquidated.

Geddes v. Anaconda Copper Mining Co., 254 U.S. 590, 597.

Treadwell v. Salisbury Mfg. Co., 7 Gray 393.

Calnan v. Guaranty Security Corp., 271 Mass.; 171 N.E. 830.

Fletcher Cyc. Corp., Vol. 13, Section 5797.

Morawetz on Private Corporations (2nd Ed.) Vol. 1, Section 413.

18 *C. J. S.* Section 515, p. 1195.

Noyes on Intercorporate Relations (2nd Ed.) Section 110, p. 208.

30 *Harvard Law Review*, 358.

XIII

Cases cited by Supreme Court of Georgia Distinguished.

Singleton v. South Western R. Co., 70 Ga. 464.

Central Railroad & Banking Company of Georgia (predecessor of Central), was operating the lines of South Western under the authority of the Act of January 22, 1852, (Acts, p. 119). Singleton was a passenger on a train operated by the Lessee on the line of South Western, and was suing for a personal injury. The contention of the South Western was that the passenger had no cause of action against it because the passenger's contract was with the Lessee. and that South Western was not liable further because the Lessee was operating the South Western line under the authority of the Act of the Legislature. The Court held that the leasing Act, although it authorized the lease, did not relieve South Western from its public burdens. In the course of the decision the Court said that a railroad company could not sell its railroad without Legislative consent. We certainly have no quarrel with that proposition. The contract clause was not involved in or mentioned in this case.

Alexander v. Atlanta & West Point R. Co., 108 Ga. 151.

The Railroad Company was about to build a Belt Line Railroad around the City of Atlanta. Alexander, a minority stockholder, claimed that the Railroad did not have power to build the Belt Line. The Railroad Company was incorporated under a special Act of the Legislature. It secured an amendment of its charter under which it adopted all of the provisions of the General Railroad Law of Georgia of 1892. While

the Railroad Company had no power under its charter to build a Belt Line, the General Railroad Law of 1892 conferred such power. The contention in the case was that the Act of 1892 was very much broader than the charter of the Railroad Company, and that the wholesale adoption of this law made a fundamental and radical change in the charter. The Supreme Court of Georgia so decided, and on the last page of the decision the Court called attention to the fact that it was not deciding that if the Railroad Company merely had secured an amendment to build the Belt Line, that this would have been a fundamental change in the charter.

In a previous decision (not referred to in this case), in Chattanooga, R. & C. Co. v. Warthen, 98 Ga. 599, the Supreme Court of Georgia had decided that the adoption by the Chattanooga Company (which was incorporated by a special Act of the Legislature) of the General Railroad Law of 1890 was not a fundamental change in its charter.

Knoxville v. Knoxville & Ohio R. Co., 22 F. 758.

The East Tennessee Railroad owned a majority of the stock of the Knoxville Railroad. It proposed to consolidate the two Railroads and to exchange the stock of the Knoxville Railroad for stock of the East Tennessee Railroad. The City of Knoxville was a minority stockholder and brought this suit. The gist of the decision in the case is in these words:

> "But Complainant's charter does not by any reasonable intendment clothe the majority with authority to sell the Company's franchise and property and, in this way coerce the minority and protesting shareholders into another and different corporation owning and operating another and different railroad under another and

different charter imposing other and different obligations and governed by a different set of corporators.

This case is nothing like the case at bar. The Courts and textwriters are all agreed that you cannot force the stockholders into an enterprise not contemplated by the original charter.

Central Railroad v. Collins, 40 Ga. 582.

In this case the City of Savannah, the Central, and South Western undertook to buy the Capital Stock of Atlantic & Gulf Railroad. The Court held that neither Railroad Company was authorized under its charter to become a stockholder in another Railroad Company; that it was against the policy of the State for the Central and South Western to hold the stock of Atlantic & Gulf because they were competing Railroads. The Court held that a venture of this kind by these two Railroads would impair the obligation of the charter as between stockholders, and said (p. 632):

> "Even the legislative will cannot, under the Constitution of the United States, impair those contract rights by making him, against his will, an adventurer in an enterprise not contemplated by the original charter *** The two enterprises are wholly different in their nature and in their risks, and a stockholder might well consent to one and refuse to consent to the other."

The philosophy of this case is identical with that of the Knoxville & Ohio Railroad case cited above.

Hazlehurst v. Savannah, etc., R. Co., 43 Ga. 13.

This case, in referring to the Collins case, supra, said:

> "We think the cases precisely parallel. If one railroad company may, at its option, buy the stock of another, it practically undertakes a new enterprise, not contemplated by its charter. This it cannot do by any implication." (pp. 57, 58).

Central Railroad v. Ga., 92 U.S. 665.

South Western R. Co. v. Ga., 92 U.S. 676.

Both of the Railroads had tax exemptions under their charters. The question in both cases was whether consolidation with another company worked a dissolution, whereby the exemption was lost. The Court held that the consolidation did not work a dissolution, and held that an Act of the Legislature of Georgia subsequent to their respective charters, attempting to tax these Railroads impaired the obligation of the charter.

We see nothing in these cases which touches our case.

Branch v. Jessup, 106 U.S. 468.

Thomas v. Railroad Co., 101 U.S. 71.

Pa. R. Co. v. St. Louis, etc. R. Co., 118 U.S. 290.

These cases are cited by the Supreme Court of Georgia to the effect that a railroad company cannot transfer its property and franchises without legislative authority. We have no quarrel with this well-established principle of law.

DENIAL OF THE RIGHTS OF SOUTH WESTERN UNDER SECTION 5 OF THE INTERSTATE COMMERCE ACT.

I

The Final Decree prevents South Western from joining with Central in an Application to the Interstate Commerce Commission under Section 5 of the Interstate Commerce Act for the acquisition of South Western properties by Central.

The final decree is copied in the Appendix of this brief, and also in the record (R. 184). The decree unquestionably prevents South Western from proceeding before the Commission under Section 5 of the Interstate Commerce Act.

II

Section 5 of the Interstate Commerce Act provides for acquisition of the railroads of one interstate railroad carrier by another interstate railroad carrier, and the jurisdiction of the Commission in such a transaction is exclusive.

The applicable parts of Section 5 of the Interstate Commerce Act are copied in the Appendix of this brief. Under Section 5 (11) of the Act the jurisdiction of the Commission is exclusive and plenary. No Court in the land has any power to prevent a carrier from making its application to the Commission; nor can any Court pre-judge the action the Commission may take. The Courts have power to correct any act of the Commission beyond its powers, but if exclusive and plenary jurisdiction means anything, it means that in the first instance the Commission has power to act without any interference by any Court.

It is unlawful under Section 5 (4) of the Act to enter into any such transaction except with the approval

and authorization of the Commission.

Smith, Trustee, v. Hoboken R. Co., 328 U.S. 123.

Thompson, Trustee, v. Texas Mexican R. Co., 328 U.S. 134.

III

There is no provision in Section 5 of the Act requiring any particular stockholders' vote to authorize the carrier to make application to the Commission . Section 5 (11) of the Act does not deal with the application, it does not come into operation until after approval by the Commission of the acquisition.

Section 5 (2) (b) of the Act provides, if the Commission finds the proposed transaction just and reasonable and in the public interest, and that the transaction is within the scope of the Act, it shall enter an order approving and authorizing the transaction. This paragraph does not provide for any vote of stockholders.

The Directors of South Western have authorized the Officers of the Company to do and perform all things necessary or desirable to fully consummate the reorganization plan as respects South Western (see Resolutions of Directors, R. 23), and the stockholders have assented by a large majority. This is sufficient authority to make the application. Section 5 (11) of the Interstate Commerce Act does not come into operation until after the Commission has approved the acquisition. This paragraph of the Act says "any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power, etc."

A requirement of State law that the carrier could not sell its property without unanimous stockholder consent would not block an application to the Commission.

IV

The provisions of Section 5 (11) of the Act with reference to the vote of stockholders should not be construed so that one stockholder could block the jurisdiction of the Commission, merely by refraining from voting.

Any such construction would destroy the jurisdiction of the Commission over the acquisition of the property of a carrier by another carrier, which was handicapped by such a condition, no matter how much the acquisition may be in the public interest.

Such a construction would do violence to the whole scope and purpose of this paragraph of the Act. The carrier is relieved from "invoking any approval under State authority." The carrier is also relieved from all "restraints, limitations and prohibitions of law, Federal, State or municipal, in so far as may be necessary to enable them to carry into effect the transaction so approved." A State law requiring unanimous consent of stockholders would certainly be a restraint, a limitation and a practical prohibition.

It should be further noted that the power to set at naught these restraints, limitations and prohibitions is conferred on the carrier and not on the Commission. The last sentence of the paragraph emphasizes this when it says: *"Any power granted by this section to any carrier or other Corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State."* If this paragraph of Section 5 means anything it means that if unanimous stockholder consent is required by State law, and this is a restraint or limitation or prohibition on the consummation of the transaction which the Commission has found in the public interest, the carrier can set it at naught and the charter

of the carrier or the law of the State shall be deemed modified accordingly.

We maintain that the phrase "a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent," refers to a greater or less vote than a majority, but that it does not contemplate that a unanimous vote would be required if the State law required a unanimous vote, because any such construction would nullify the law in such a case. The phraseology demonstrates that Congress did not have in mind unanimous stockholder consent. Such a requirement is not the result of any vote. One stockholder not voting would kill the proposed transaction.

This Court definitely did not decide this question in Callaway v. Benton, 336 U.S. 132. On page 140 of this decision the Court said: "It may be noted, in addition, that Section 5 (11) contains a proviso that the majority vote provision shall not apply if 'a different vote is required under applicable State law in which case the number so required shall assent.' Whether that proviso is operative when a State's law requires unanimous consent of the shareholders is a question we need not decide."

It would be convenient if this Court would now decide this question. But the Court may feel that it is not authorized to decide such a question in advance of an application to the Commission.

V

This Court could not have decided in Callaway v. Benton that South Western could not make an application to the Commission under Section 5 of the Interstate Commerce Act.

A matter of that kind in the case of Callaway v. Benton was beyond the jurisdiction of this Court. The

Commission having exclusive jurisdiction over the matter of acquisition, this Court could not deny its jurisdiction or pre-judge its actions, for the same reasons that the Supreme Court of Georgia has no such power

VI

At the time the Benton suit was brought in the State Court there was no proceeding pending under either Section 5 of the Interstate Commerce Act, or under Section 77 (b) of the Bankruptcy Act to authorize the transfer of the properties of South Western to Central.

This Court said in Callaway v. Benton (p. 140);

> "The Commission can undoubtedly carry on Section 5 proceedings simultaneously with Section 77 reorganization proceedings, see United States v. Lowden, 308 U.S. 225 (1939), but that procedure was not followed in this case. The Commission preferred instead to carry out the consolidation under the authority of Section 77 (b) (5) of the Bankruptcy Act which provides that the plan of reorganization may include 'the merger or consolidation of the debtor with another corporation or corporations.' That power flows from a different source than the power over consolidations under the Interstate Commerce Act."

The method of acquisition adopted under the plan was purchase, not merger or consolidation. The plan says (R. 62):

> "The method of acquisition whether through purchase, merger or consolidation, shall, subject to the approval of the Commission and the Court, be determined by the Trustee or by the reorganization managers when they begin to function."

Under the order of the District Court passed May 18, 1948, it was determined that the method of acquisition should be "by *purchase.*" (R. 65).

At the time Benton's suit was brought in the State Court (March 25, 1947), there could have been no proceeding under Section 77 (b) of the Bankruptcy Act to authorize the acquisition.

The last paragraph of the plan (R. 62, 63), paraphrases the last sentence of Section 77 (f) of the Bankruptcy Act and specifically provides against any transfer, sale or merger or consolidation "until further action by the Commission."

There could be no action by the Commission on the transfer of the properties by South Western to Central until after the plan was confirmed. Section 77 (f) authorizes the Commission to grant authority for consummation of the plan "upon confirmation of a plan." When Benton's case was brought, the plan had not been confirmed by the Court. The Commission had not certified the plan to the Court. Under sub-section (e) of Section 77 of the Bankruptcy Act (copied in the Appendix), the Court could not confirm the plan until certified to it by the Commission. The plan was submitted February 11, 1947, to South Western for its acceptance or rejection on or before March 28, 1947, (R. 12). March 28, 1947, South Western accepted the plan (R. 65), which was three days after Benton's suit was brought.

The interlocutory injunction issued by the State Court April 24, 1947 (R. 43) shortly after the State Court suit was filed, foreclosed any proceeding before the Commission as to acquisition of South Western.

VII

Under the provisions of Section 5 (11) of the Interstate Commerce Act, the Commission could authorize the acquisition and South Western could carry it out, notwithstanding that under the law of Georgia as interpreted by the Supreme Court of Georgia unanimous stockholder consent is necessary, and it is impossible to secure such consent.

The Supreme Court of Georgia in its opinion stated that it was not to be presumed that either this Court or the Commission would set aside or nullify its decision that under the laws of Georgia unanimous stockholder consent is necessary for a sale of South Western's properties.

In the case of Callaway v. Benton this Court said (p. 140):

> "Nothing that we have said derogates in any way from decisions of this Court upholding the power of the Interstate Commerce Commission, in the exercise of its statutory obligations to override State laws interposing obstacles in the path of otherwise lawful plans of reorganization." (Citing in a footnote cases to sustain the text).

The long line of cases decided by this Court upholding this principle are cited in the petition for certiorari, p. 14.

We think if the Commission is given the opportunity that it would set aside the obstacle of unanimous stockholder consent; and we think there is no reason why this Court should not reverse the Supreme

Court of Georgia and modify the injunction contained in the final decree.

Respectfully submitted,

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Dated May 25, 1950.

APPENDIX

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CHARTER OF THE SOUTHWESTERN RAILROAD COMPANY

(Acts 1845, Page 132).

AN ACT TO INCORPORATE THE SOUTHWESTERN RAILROAD COMPANY, WITH POWER TO EXTEND BRANCHES TO ALBANY, IN THE COUNTY OF BAKER, AND FORT GAINES, IN THE COUNTY OF EARLY, OR TO POINTS BELOW THOSE PLACES ON THE FLINT AND CHATTAHOOCHEE RIVERS, AND TO PUNISH THOSE WHO MAY WILFULLY INJURE THE SAME—AND TO INCORPORATE COLUMBUS AND SOUTHWESTERN RAILROAD COMPANY.—*Approved December* 27, 1845.

SEC. 1. *Be it enacted by the Senate and House of Representatives of the State of Georgia, in General Assembly met, and it is hereby enacted by authority of the same,* That for the purpose of constructing a railroad communication between the city of Macon and the navigable waters flowing into the Gulf of Mexico, J. Cowles, E. Alexander, Chas. Day, James Dean, Thaddeus G. Holt, W. B. Parker, A. R. McLaughlin, Charles Cotton, James Rea, Erastus Graves, J. L. Jones, Charles Campbell, Edwin Graves, E. A. Nisbet, H. G. Lamar, J. D. Carhart, J. B. Ross, T. A. Brown, R. H. Randolph, N. C. Munroe, and such other corporation and individuals as may be associated with them and their assigns, shall hereafter be a body corporate by the name and style of the "The Southwestern Railroad Company," and by said corporate name shall be capable in law to buy, hold and sell so much real and personal estate as may be necessary for said purpose, make contracts, sue and be sued, make by-laws, and do all lawful acts properly incident to a corporation, or necessary and proper for the transaction of the business for which it is incorporated, and

Incorporation

to have and use a common seal, and the same to alter and destroy at its pleasure.

Stock.

SEC. II. *And be it further enacted by the authority aforesaid,* That the capital stock of said company shall be two millions of dollars, divided into shares of one hundred dollars each, but may be increased to a sum not exceeding three millions of dollars, whenever it may be deemed expedient by a majority of the board of directors of said corporation for the time being.

Built between Macon and points between Albany and Ft. Gaines and branch roads.

SEC. III. *And be it further enacted by the authority aforesaid,* That the company herein incorporated shall confine their efforts and enterprise to the building and completion of a railroad communication from the city of Macon to some point intermediate between Albany and Fort Gaines, or to any point or points upon the Flint and Chattahoochee rivers below Albany and Fort Gaines, to be agreed upon by the company, from which point the company may construct branch railroads to Albany and Fort Gaines; said road and its branches being of such width and dimensions as may be deemed expedient by the directors of the company or their agents, the company paying to owners of land through which the said road or its branches may pass, a just indemnity for the land covered by the railway, in manner as hereinafter provided, and for three hundred feet on each side of the same, for the procurement therefrom of timber, earth, stones and other materials; and whenever a person shall own land on both sides of said railway, at any point, the company shall be bound to suffer such owner to construct, for his own convenience, such road or bridge across the railroad as may not obstruct, hinder or incommode its use and passage.

SEC. IV. *And be it further enacted by the authority aforesaid,* That when the company cannot agree with

any person over whose land the railroad may pass, as to the amount of compensation to be paid by the company, or the amount of damage sustained by the owners, the amount of such damage or injury shall be ascertained and determined by the written award of three sworn appraisers, to be chosen, one by the company, one by the owner of the land if he thinks proper, and one by the Inferior Court of the county in which the land lies; but if such owner shall decline to appoint an appraiser, then two appraisers to be appointed by the Inferior Court aforesaid, and one by the said company, the award of whom shall operate as a judgment for the amount against the company, and shall be enforced by an execution from the Inferior Court, with the right of appeal to either party, to be tried by a special jury, at the next term thereafter of the Superior Court of said county, and the decision shall vest in the said company the fee simple of the land in question, and in the other party a judgment for its value thus ascertained, which may be enforced by the ordinary process of said Court.

How to ascertain damages to lands.

SEC. V. *And be it further enacted by the authority aforesaid*, That books of subscription to the stock of said company shall be opened on the first day of March, eighteen hundred and forty-six, at the following places, under the superintendence of the commissioners named, to remain open two days, viz: At Macon, under the superintendence of Elam Alexander, T. G. Holt, James Dean, Briggs H. Moultrie, Charles Day, and J. Cowles; at Perry, Houston county, under the superintendence of James Everett and William Felton; at Travelers' Rest, Dooly county, under the superintendence of John Young and Abel Holton; at Lanier, Macon county, under the superintendence of John Bryan and John C. Helvinston; at Americus, Sumpter county,

Subscriptions, how received, etc.

under the superintendence of James K. Daniel and William Dennard; at Starksville, Lee county, under the superintendence of Joseph Bond and Leonidas Mercer; at Albany, Baker county, under the superintendence of George B. King and Phineas M. Nightingale; at Cuthbert, Randolph county, under the superintendence of Barzillia Graves and William A. Tennille; at Fort Gaines, Early county, under the superintendence of Joel Crawford and Samuel Gainer. The different sets of commissioners above appointed shall advertise the time, place and terms of subscription, in public gazette or gazettes of the places respectively, and in the event of no paper being published in the place, then in the public gazettes of Albany and Macon; and such advertisement shall be inserted at least four weeks before the day when the books are to be opened. Upon the books being opened, as aforesaid, the commissioners, or a majority of them, shall receive from individuals, corporations or companies, subscriptions for any number of shares they may see fit to subscribe for, on condition that at the time of subscribing there shall be paid down to the commissioners, or a majority of them, five dollars on each share subscribed for, for which the commissioners shall give a receipt, and forthwith remit the same to the commissioners at Macon, to be by them deposited for safe keeping in the Commercial Bank at Macon, subject to the draft or order of said company by its President or board of directors, after the company shall be organized; and the various commissioners shall also forward to the commissioners at Macon a list of the subscribers, with the amount paid and the number of shares subscribed for set opposite each name. And in the event any portion of said stock remains unsubscribed for after the closing of the books, on the expiration of the two days, then the commissioners at Macon shall be empowered and authorized to

procure the balance of the stock so remaining unsubscribed for, to be taken up in such time and manner as to them may seem fit; and so soon as one-fourth thereof is taken, they shall call a meeting of the stockholders at Macon, to organize the company in manner hereinafterwards pointed out.

SEC. VI. *And be it further enacted by the authority aforesaid,* That for the organization of the company, the commissioners at Macon shall appoint a suitable time and place for the meeting of the stockholders, which shall be advertised in the gazettes of Macon and Albany for three weeks immediately preceding the day, at which time and place the stockholders may attend in person, or be represented and vote by proxy; and the stockholders being thus assembled, shall proceed, under the supervision of the commissioners at Macon, to elect, by ballot, a President and five directors to serve for one year.

How to call first meeting of stockholders.

SEC. VII. *And be it further enacted by the authority aforesaid,* That in said election for President and directors, the votes shall be taken by the following rule: Each stockholder shall be entitled to a number of votes equal to the number of shares he may hold in the stock of said company. And on all future elections for President and directors, in the making, altering or repealing of by-laws, and on determining on measures involving the general interests of the company, at any stated or occasional corporate meeting, the votes shall be governed by the above rule.

Each share entitled to one vote.

SEC. VIII. *And be it further enacted by the authority aforesaid,* That the election for the President and directors shall be made annually, according to a by-law to be made for that purpose; and in case any

President and directors elected annually. Board may fill vacancies.

vacancy occur in the board between two periods of general election, the remaining members of the board shall fill such vacancy from the stockholders, by the selection of a suitable person to serve until the next regular election. And if it should so happen that the day of annual election for President and directors should pass without an election being affected on any day for such election, the corporation shall not thereby be dissolved or deemed to be discontinued, but it shall be lawful on any other day to hold and make such election, in such manner as may be prescribed by the by-laws of the corporation, subject always to the rule prescribed in the seventh section of this Act.

Majority of Directors quorum. Board may call in instalments to stock.

SEC. IX. *And be it further enacted by the authority aforesaid,* That a majority of the directors shall constitute a board for the transaction of business, of whom the President shall be one, save in a case of sickness or necessary absence, in which case his place may be supplied by any director appointed by the President. The board of directors may call for instalments on each share, in such amounts and at such times as they may deem necessary for the interest of the company, not to exceed one hundred dollars on each share in the whole, giving at least sixty days notice in the public gazettes of Macon and Albany of such call; and any and all stockholders failing to pay any instalments so called for within thirty days after the time designated in such call, shall forever forfeit his stock in said company, and all payments which he may have made thereon, and the stock so forfeited shall vest in and become the property of the said company, to be disposed of as the board of directors thereof shall determine.

SEC. X. *And be it further enacted by the authority aforesaid,* That certificates of stock shall be issued to

the stockholders on the payment of the sum required at the time of subscription, which shall be transferable on the books of the company only, and by personal entry of the stockholder or his legal attorney or representative, duly authorized for that purpose.

How stock may be transferred.

SEC. XI. *And be it further enacted by the authority aforesaid,* That the board of directors, for the time being, shall have power to employ engineers, conductors, artists, managers, laborers, and to appoint any and all officers that may be necessary for transacting the business of the company, fixing the salary or amount of compensation each and all of such officers and agents shall receive; and the board of directors shall have power to fix the rate of toll upon all produce, goods, wares, merchandize and other effects, transported on the railroad, and also the rate of toll to be charged for each and every passenger passing or traveling thereon, with power to collect the same; and shall be capable of exercising all such other powers and authorities for the well governing and ordering the affairs of said company as to them shall seem fit for the interests of said company.

May employ officers and servants. May fix rates.

SEC. XII. *And be it further enacted by the authority aforesaid,* That the directors shall keep fair and regular entries of their proceedings, in a book to be provided for that purpose, and on every question when any one director may require it, the yeas and nays of the directors voting shall be duly entered on the minutes, and those minutes shall at all times be produced to the stockholders, on demand, when at a meeting thereof they shall be required.

Minutes.

Yeas and nays.

SEC. XIII. *And be it further enacted by the authority aforesaid,* That whenever the said railroad shall

Bridge public roads.

intersect any public road, the company shall be bound to build a safe and substantial bridge, to be afterwards maintained and kept up by the company; and any public or private bridges may at any time be built across the railroad, provided such bridges do not at all obstruct or incommode its use.

May not be taxed higher than ½ per cent. of net income.

SEC. XIV. *And be it further enacted by the authority aforesaid,* That the said railway and its appurtenances, and all property therewith connected, shall not be subject to be taxed higher than one-half of one per cent. upon its annual net income.

Punishment for injuring road.

SEC. XV. *And be it further enacted by the authority aforesaid,* That if any person shall wilfully and maliciously destroy, or in any manner damage, injure or obstruct, or shall wilfully and maliciously cause, or aid and assist, or counsel or advise any other person or persons to destroy, or in any manner damage, injure or obstruct said railroad, or any part thereof, or any bridge, vehicle, edifice, right of privilege granted by this act, and constructed for use under authority hereof, such person so offending shall be liable to be indicted, and on conviction thereof shall be imprisoned at hard labor in the penitentiary for a term not less than four years, in the discretion of the Court, paying all the expenses of the prosecution, and shall also be liable to a suit for damages on the civil side of any Court having jurisdiction, at the instance of the company or any other person aggrieved.

SEC. XVI. *And be it further enacted by the authority aforesaid,* That after the route of the said railway shall have been actually surveyed, located and adopted, and a plat thereof deposited in the Department of State, it shall not be lawful for any other rail-

road to be built, cut, or constructed, in any way or manner, or by any authority whatsoever, running laterally within thirty miles of the route so adopted, unless by the said company, or with the consent of the board of directors hereof for the time being: *Provided*, this act shall not be so construed as to prevent the construction of a railroad from the city of Columbus, as is hereinafter provided for by this Act.

No other road can run parallel within 30 miles.

Proviso.

SEC. XVII. *And be it further enacted by the authority aforesaid*, That any number of stockholders who, together, shall be proprietors of five thousand shares, shall have the power at any time of calling a meeting of stockholders for purposes, or the transaction of any business, or for action of the stockholders touching any matter or thing appertaining to the interests of the company, giving sixty days notice of such meeting in the public gazettes of Macon and Albany, specifying in their call the objects of the meeting or the subject matter to be considered by the stockholders.

5,000 may call meeting of stockholders.

SEC. XVIII. *And be it further enacted by the authority aforesaid*, That the principal office of the company shall be located at Macon, with subordinate offices or agencies at Albany and such other places as the board of directors may deem necessary and proper, and all elections and meetings of the stockholders shall be held at the principal office only.

Principal office.

SEC. XIX. *And be it further enacted by the authority aforesaid*, That the said company shall have full power and authority to carry such railroad over all and any rivers, creeks or water courses or waters that may be in the route thereof, or of either branch railroad, by suitable bridges, or other proper means: *Provided*, that when such railway shall cross any navigable water course, that the same shall not be so con-

Bridge rivers, etc.

structed as to impede or in any way obstruct the navigation thereof.

Exclusive right continue for 50 years.

SEC. XX. *And be it further enacted by the authority aforesaid,* That the exclusive right granted by this Act to the Southwestern Railroad Company to construct, keep up and use a railroad from Macon to the Flint and Chattahoochee, shall be and continue for the term of fifty years: *Provided, nevertheless,* that the said company shall, after the lapse of said term of fifty years, be and remain incorporated and vested as to their own work, with all the estate, rights, powers and privileges by this act granted, and secured except the *exclusive right* aforesaid; but the Legislature may renew and extend that exclusive right, upon such terms as may be prescribed by law, and be accepted by said incorporated company.

City of Columbus may build road to connect with this.

SEC. XXI. *And be it further enacted,* That whenever the Mayor and Council of the city of Columbus shall deem it expedient to construct a railroad from the city of Columbus to connect with the railroad herein authorized, they or a majority of them shall have power and authority to create a capital stock not exceeding one million of dollars, to be divided into shares of the value each not exceeding one hundred dollars, to be subscribed for and transferred under such terms, conditions and restrictions as may be prescribed by said City Council.

Name of such company.

SEC. XXII. *And be it further enacted,* That said company, when created, shall be known by the name and style of "THE COLUMBUS AND SOUTHEASTERN RAILROAD COMPANY OF GEORGIA," and by and under such name shall have the right to build and construct a railroad from the said city of Columbus, connecting

with or terminating at or near the road herein authorized, at such point or place as may be determined upon by the stockholders of the said Columbus and Southeastern Railroad Company of Georgia, and shall be authorized to have and exercise all the powers, privileges, rights and immunities, and be subject to all the limitations and restrictions in the building and constructing of said road, as are herein prescribed for the Southwestern Railroad Company.

Sections 94-328, 94-329 Code of Georgia (Act March 10, 1933).

94-328. *"Authority to Sell or Lease Railroad.* Any railroad corporation organized under the laws of this State, which has heretofore leased its property for a long term of years to another corporation, which lease has terminated, and the lessor is not a going concern or equipped to conduct the operations of a railroad company, is hereby authorized to sell or lease its property, rights, and franchises to another railroad corporation upon such terms as may be agreed upon by the board of directors of the selling or lessor corporation and assented to by the holders of a majority of its stock. (Acts 1933, p. 235)."

94-329. *"Rights Acquired.* The railroad corporation to which a sale or lease is made under the terms of the preceding section shall acquire all the property, rights, and franchises of the selling, or lessor, corporation. (Acts 1933, p. 235)."

The above two Code Sections are codified from the Act of March 10, 1933, p. 235.

FINAL DECREE AND JUDGMENT

IN THE SUPERIOR COURT OF BIBB COUNTY, GEORGIA

L. O. BENTON, JR., *et al.*
vs.
SOUTH WESTERN RAILROAD CO., *et al.*

No. 11037
June Term 1947

1.

It appears to the Court that Dr. W. G. Lee, I. L. Domingos, Gordon S. Chapman, J. P. Illges, Jr., and Charles Loridans, individually, and as members of the Stockholders Protective Committee of the South Western Railroad Company have intervened herein as parties plaintiff, and that Charles J. Haden has been stricken as a party plaintiff.

2.

The plaintiff and plaintiffs-intervenors have moved the Court for a judgment or decree in their favor on the pleadings in the cause.

It is now considered, adjudged and decreed:

(a) That the said motion be granted, and the defendants enjoined as prayed;

(b) That the officers and directors of South Western Railroad Company be permanently enjoined from carrying into effect the action of the stockholders of South Western Railroad Company taken at the meeting of March 28, 1947;

(c) That the officers and directors of South Western Railroad Company be permanently enjoined from transferring or conveying to the reorganized Central of Georgia Railway Company, or to anyone else, or any

other company, all the defendant company's railroad properties, rights and franchises based on the aforesaid action of the stockholders;

(d) That the officers and directors of the defendant company be permanently enjoined from executing any written instrument which might convey the fee simple title to the properties just mentioned unto the reorganized company, or any other company, based on a mere majority vote of the stockholders of the defendant company;

(e) That the officers and directors of the defendant company be permanently enjoined from doing and performing any act in behalf of South Western Railroad Company which might tend to consummate the plan of reorganization of Central of Georgia Railway Company with respect to the acquisition of the properties of the South Western Railroad Company.

It is further considered, ordered, adjudged and decreed that the costs of this proceeding, to be taxed by the Clerk, be assessed against the defendants herein.

In open Court this 5th day of December, 1949.

MALLORY C. ATKINSON,
J. S. C. M. C.

HALL & BLOCH,
Attorneys for Plaintiff and
Plaintiffs-Intervenors.

Filed in office December 5, 1949.

LILLIAN LAVINE,
Deputy Clerk.

Applicable Paragraphs of Section 5 of Interstate Commerce Act

(Italics ours)

Section 5 (2) (a):

"It shall be lawful, with the approval and authorization of the Commission, as provided in Subdivision (b)—for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one Corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise."

Section 5, (2) (b):

"If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a), *and will be consistent with the public interest,* it shall enter an order approving and authorizing such transaction."

Section 5 (4):

"It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of sub paragraph (a) thereof."

Section 5 (11):

"The authority conferred by this Section *shall be exclusive and plenary,* and any carrier

or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or corporate merger, *of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent,* of the votes of the holders of the shares entitled to vote of the capital stock of such corporation***) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction *without invoking any approval under State authority;* and any carriers or other corporations, and their officers or employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the anti-trust laws and of all other *restraints, limitations, and prohibitions of law, Federal, State, or municipal, in so far as may be necessary* to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this Section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, *but any power granted by this Section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.*"

Applicable Parts of Section 77 of the Bankruptcy Act (U.S. C.A. Title 11, Section 205).

Sub-section (d) provides that the plan of reorganization may be filed by the Trustee.

Sub-section (e) provides that upon certification of the plan by the Commission to the Court, that the Court shall either approve or reject the plan; that if the Judge shall approve the plan the Commission shall submit the plan to the creditors and that the acceptance or rejection shall be in writing; that the Commission shall certify to the Judge the results of the submission; and that upon receipt of such certificate the Judge shall confirm the plan if satisfied that it has been accepted by two-thirds in amount of each class of creditors; provided if it has not been so accepted the Judge may never the less confirm the plan if after hearing he is satisfied and finds that fair and equitable treatment is accorded those rejecting the plan.

Sub-section (f) "***Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and control of the Judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. *** And the Judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees.

***Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan."

33 HENRY VIII C.27

The bill for leases of hospitals, colleges and other corporations.

Allbeit that by the common laws of this realm of England, all assents, elections, grants and leases had, made and granted the dean, warden, provost, master, president or other governor of any cathedral, church, hospital, college or other corporation by whatsoever name they be incorporated or founded with the assent and consent of the more or greater part of their chapiter, fellows or brethren of said corporation having voices of assent thereto, be as good and effectual in the law to the grantees and lessees of the same as if the residue or whole number of such capiter, fellows and brethren of such corporation, having voices of assent had thereto consented and agreed; (2) yet the said common laws notwithstanding, divers founders of such deaneries, hospitals, colleges and corporations within the said realm, have upon the foundation and establishment of the same deaneries, hospitals, colleges and other corporations have established and made amongst other their peculiar acts, local statutes and ordinances, that if any one of such corporation having power and authority to assent or dissent should and would deny any such grant or grants, that then no such lease election or grant should be had, granted or leased; and for the performance of the same every person having power of assent to the same, have been and be daily thereunto sworn, and so the residue may not proceed to the perfection of such elections, grants and leases according to the course of the common law of this realm, unless they should incur the danger of perjury; (3) For the avoiding whereof, and for the due execution of the common law universally within this realm, and every place, in one con-

formity of reason to be used; be it ordained established and enacted by the authority of this present parliament. That all and every peculiar Act, order, rule and estatute thereof heretofore made or hereafter to be made by any founder or founders of any hospital, college, deanery or other corporation at or upon the foundation of any such hospital, college, deanery or corporation, whereby the grant, lease, gift, or election of the governor or ruler of such hospital, college, deanery or corporation with the assent of the more part of such the same hospital, college, deanery or corporation as have or shall have voice or assent to the same, at the time of such grant, lease or election hereafter to be made, should be in anywise hindered or let by any one or more, being the lesser number of such corporation contrary to the form, order and course of the common law of this realm of England, shall be from henceforth frustrate, void and of none effect; (4) and that all oaths heretofore taken by any person or persons of such hospital, college, deanery and other corporation shall be, for and concerning the observance of any such order, estatute or rule, deemed void and of no effect; (5) and that from henceforth no manner person or persons of any such hospital, college, deanery or other corporation shall be in anywise compelled to take any oath for the observing of any such order, estatute or rule; (6) upon the pain of every such person so giving such oath to forfeit for every time so offending five pounds; the one moiety thereof to be to the use of our Sovereign lord the King, and the other moiety thereof to any of the King's subjects which will sue for the same in any of the King's Courts of record, by action of debt, bill, plaint, information or otherwise; wherein the defendant shall not be admitted to wage his law nor any protection nor essoin, or any other dilatory plea admitted or allowed.

FILED
JUN 22 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. 101

SOUTH WESTERN RAILROAD COMPANY et al.,
Petitioners,

vs.

L. O. BENTON, JR., et al.,
Respondents.

BRIEF

Of Counsel for the Respondents in Opposition to the Grant of the Writ of Certiorari.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. .....

SOUTH WESTERN RAILROAD COMPANY et al.,
Petitioners,

vs.

L. O. BENTON, JR., et al.,
Respondents.

BRIEF

Of Counsel for the Respondents in Opposition to the Grant of the Writ of Certiorari.

I.

The first question stated by the petitioners in their petition for the Writ of Certiorari is:

> "First, on the constitutional question, in holding that the Act of the General Assembly of Georgia of March 10, 1933 (Georgia Laws 1933, p. 325), now codified as Sections 94-328 and 94-329 of the Code of Georgia of 1933, authorizing a sale by South Western

of its properties with the assent of the holders of a majority of its stock, was in violation of Article I, Section 10, Paragraph I of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts, in that said Act of March 10, 1933, impaired the obligation of a contract contained in the charter of the South Western granted by the State of Georgia in 1845 (Georgia Laws 1845, p. 132); and in holding that the said Act of 1933 was void because it made a fundamental change in the charter of South Western; and that, therefore, South Western could not sell its properties without unanimous consent of its stockholders." (Petition for the Writ of Certiorari, page 2.)

In thus posing the question, the petitioners overlooked the salient feature of this case. That salient feature is that the Supreme Court of Georgia in the first headnote of its opinion held, as a matter of State Law, that the Act of the General Assembly of Georgia of March 10, 1933, now codified as Section 94-328 and 94-329, of the Code of Georgia of 1933, as applied to the South Western Railroad Company, did constitute a vital and fundamental amendment of its charter and violated not only the contract clause of the Federal Constitution but the contract clause of the State Constitution.

This Court, of course, will recall the former appearances of this controversy in this Court (Callaway, Trustee v. L. O. Benton, Jr., et al., 336 U. S. 132, 97 L. Ed. 443).

Succinctly stated, the controversy which then came to the Court was this:

The Central of Georgia Railway Company was in reorganization under Section 77 of the Bankruptcy Act.

South Western Railroad Company, a corporation of the State of Georgia, chartered by the General Assembly of Georgia in 1845, had leased its lines to the Central. In the plan of reorganization of the Central, the Central was authorized to acquire the South Western, if it could be acquired, on the terms stated in the plan. Whether or not it could be so acquired depended upon the quantum of corporate authority necessary to effect a sale of South Western's properties under the laws of the State of Georgia. The Central and the officers of the South Western were of the opinion that the Act of 1933 aforesaid, applied to the South Western and that it could accept the offer contained in the plan and convey its properties if the conveyance were authorized by mere majority vote of its stockholders. Benton and other stockholders of the South Western disagreed, and contended that the Act of 1933 did not apply to the South Western and could not so apply constitutionally, either under the State Constitution or the Federal Constitution.

Benton instituted a suit in the Superior Court of Georgia seeking the determination of this question. Thereupon, the Trustee of the Central enjoined the prosecution of the suit by a proceeding in the bankruptcy court. The State Court granted an interlocutory injunction in accordance with the prayers in Benton's suit. The Trustee amended his injunction proceeding in the Bankruptcy Court and prayed that this State Court judgment be set aside. The Bankruptcy Court, the Federal District Court of the Southern District of Georgia, granted the Trustee the relief he prayed. Benton appealed to the United States Court of Appeals for the Fifth Circuit. That Court reversed the Bankruptcy Court. (Benton v. Callaway, 165 Fed. [2d] 877.)

The Court of Appeals in the course of its opinion (165 Fed. [2d] at page 880), said:

> "The question submitted to the State Court for decision was whether or not the fee of South Western's properties, exclusive of the lease, could be legally conveyed by the owner by vote of a simple majority of its stockholders. This was peculiarly a question of State Law."

Your Honors granted Certiorari and on February 7, 1949, affirmed the judgment of the United States Court of Appeals for the Fifth Circuit. (Callaway et al. v. Benton et al., 336 U. S. page 132.)

In the course of the Court's opinion, Your Honors, speaking through the Chief Justice, said:

> "The statute does not, however, give the Commission or Court the right to require acceptance by a lessor, not in reorganization, of an offer for the purchase of its property, and no such power has been asserted by the Commission in this case. The plan of reorganization in effect hands South Western a contract of sale. Whether or not South Western signs the contract must depend not only upon its business judgment, but also upon the charter of the company and the laws of the state of its incorporation. There is, therefore, no occasion to override state law. The plan implicitly accepts it as controlling." (At page 141.)

The concluding paragraph of the majority opinion, commenced:

> "We conclude that under the narrow facts presented here, the Bankruptcy Court erred in enjoining the State Court suit leading to a determination of the requirements of Georgia Law with respect to sale of the entire assets of South Western. This question was already in litigation in the state court when first raised in the Federal Court." (336 U. S. at page 150.)

So the case having run its course in the Federal Court came back to its point of origin, the Superior Court of Bibb County, Georgia. In due time that court granted a permanent injunction as prayed by Benton. The Central and South Western appealed to the Supreme Court of Georgia which then proceeded to determine "the requirements of Georgia Law with respect to the sale of the entire assets of South Western." (South Western Railroad Co. et al. v. Benton et al., 206 Georgia 770.) Now the South Western and the Central ask, by the present petition for certiorari, to have the Supreme Court of the United States review the judgment of the Supreme Court of Georgia, and determine the requirements of the state law.

In seeking the review in this respect, the petitioners contend in this question one, that the Supreme Court of Georgia erred in holding that the 1933 Act of the Georgia Legislature violated the Federal Constitution, overlooking the fact that the Supreme Court of Georgia also passed upon the requirements of State Law. The first headnote of the opinion of the Supreme Court of Georgia, as it appears in the Georgia Law Reporter of May 19, 1950 (206 Georgia 770, 771), is:

> "A corporation has only the power conferred upon it by its charter. Its grants of power and exemptions are to be strictly construed, and its obligations are to be strictly performed, whether they may be due to the State or to individuals. A railroad corporation cannot, without special authority of statute, sell its franchise and property essential to the performance of its duty to the public. A charter granted by the State to a railroad corporation constitutes a contract between the State and the corporation, between the corporation and its stockholders, between the stockholders and the State, and between the stockholders inter sese. And where such a charter does not itself

contain authority to the corporation to sell its franchise and property, and the State does not therein or by general law of force at the time the charter is granted, reserve the right to change, alter, or modify the charter, it cannot thereafter, by specific amendment or by general law, authorize such a sale without unanimous consent of the stockholders, for to do so would constitute a vital and fundamental amendment of the charter, and violate the provisions of the Federal and State Constitutions (Code Sec. 1-134 and Code, Ann. Sec. 2-302), prohibiting the passage of any law impairing the obligation of contract.

"(a) Under the foregoing principles, the General Railroad Law of 1892 (Code Sec. 94-311 and 94-318), and the act of the General Assembly approved March 10, 1933 (Code Sec. 94-328 and 94-329), have no application to the South Western Railroad Company, incorporated under the act approved December 27, 1845, and prior to the reservation by the State in the Code of 1863 (now Code sec. 22-1202 and 22-1203), of the power to change, alter, or modify charters granted by it."

At page one of their brief, in support of the petition for the Writ of Certiorari, counsel for the petitioners say:

"Under the contract clause of the Federal Constitution this court will determine for itself whether there be a contract, whether its obligation has been impaired, and will also determine for itself the meaning and application of the State Constitutional or Statutory Provisions said to create the contract, or by which it is asserted an impairment has been effected."

For that provision counsel for the petitioners cite:

Coombs v. Getz, 285 U. S. 434;
Phelps v. Board of Education, 300 U. S. 319;
Higginbotham v. Baton Rouge, 306 U. S. 535.

Granting the validity of this assertion it overlooks the fact that in neither of the cases cited was there under consideration by the Supreme Court of the United States a case in which an impairment clause in a State Constitution had been construed and applied by the highest court of the state.

In the case now before your Honors we have involved not only a state constitutional provision, but the state law question as to whether or not the Georgia Act of 1933 is applicable to the South Western.

As we have demonstrated, the Supreme Court of the United States and the United States Court of Appeals for the Fifth Circuit have in previous appeals of this very case held that the questions involved were questions of state law.

We most respectfully submit that the judgment of the State Court is final and conclusive in its determination of the applicability of the Act of 1933 to the situation here presented.

The Supreme Court of the United States has no authority on a Writ of Error from a State Court to declare a state law void by reason of its collision with a State Constitution.

Calder v. Bull, 3 U. S. 386, 3 Dallas 386;
Jackson v. Lampshire, 28 U. S. 280, 3 Peters 280.

An objection to a state statute, so far as it rested on the State Constitution, is not examinable in the Supreme Court of the United States.

The Volant, 59 U. S. 71, 18 Howard 71;
Withers v. Bradley, 61 U. S. 84, 20 Howard 84.

Whether an Act of the Pennsylvania Assembly was repugnant to the Pennsylvania Constitution was not open

to re-examination in the Federal Court, as the question was not one of Federal cognizance in a case brought to the Supreme Court by a Writ of Error to a State Court.

In re Pennsylvania College cases, 80 U. S. 190, 13 Wallace 190.

The decision of the highest court of the state that a statute is repugnant to the Constitution of that State is conclusive upon the Supreme Court of the United States in reviewing the judgment of the State Court.

Montana ex rel. Haire v. Rice, State Treasurer, 204 U. S. 291.

In In re Kammler, 136 U. S. 436, the Supreme Court of the United States said that the decision of the highest court of New York that the punishment of death by electricity, as prescribed by New York law, is not a cruel punishment within the meaning of the New York Constitution prohibiting "cruel and unusual punishment" is not re-examinable by the Supreme Court of the United States.

At page 447 of its opinion the Supreme Court of the United States said that the decision of the State Courts sustaining the validity of the Act under the State Constitution was not re-examinable by the Supreme Court of the United States. This holding was made despite the fact that the Federal Constitution, in the Eighth Amendment thereof, prohibits the infliction of cruel and unusual punishments.

A decision of a State Supreme Court sustaining the constitutionality of legislation is conclusive of review by the Federal Supreme Court so far as it rests on State Constitution.

Green v. Frazier, 253 U. S. 233, 234, 40 Supreme Court 499;

Davis v. Hilderbrandt, 241 U. S. 565.

A State Supreme Court decision is decisive as to whether a State Statute is in derogation of a State Constitution.

> Lehman v. State Board of Public Accountancy, 263 U. S. 394, 44 Supreme Court 128.

A question of conflict between a State Statute regulating municipal improvements and the State Constitution is for determination of the State Court.

> Utley v. City of St. Petersburg, 292 U. S. 106, 54 Supreme Court 593 (4).

The question of whether the California Insurance Code unconstitutionally delegated legislative functions to the Insurance Commissioner of California was a question of State law decision of which by the State Supreme Court was binding upon the United States Supreme Court.

> Neblett v. Carpenter, 305 U. S. 297, 59 Supreme Court 170 (3).

It can make no difference here that the contract clause appeared in the State Constitution for the first time in the Constitution of 1877, as stated by counsel for the petitioners at page 3 of their brief. The contract clause didn't appear in the Constitution of the United States until the adoption of the Constitution in 1789. Nevertheless, in the Dartmouth College case (4 Wheaton, page 518) it was held to protect, as a contract, the charter granted by the British Crown to the Trustees of Dartmouth College in the year 1769, a date prior even to the Declaration of Independence.

II.

The second question presented in the petition for certiorari is:

> "Second, the Supreme Court of Georgia in its judgment also held that it would not leave South Western

and its officers free to join the Central in an application to the Interstate Commerce Commission for authority and approval of the acquisition of the railroad properties of the South Western by Central under Section 5 of the Interstate Commerce Act, stating that the Supreme Court of the United States had virtually decided this question against petitioners in the decision of the case of Merrel P. Callaway, Trustee, v. L. O. Benton, Jr., et al., 336 U. S. 132, 93 L. Ed. 443, the Supreme Court of Georgia saying:

> " 'The United States Supreme Court having once held that the question here presented is one for determination by the State court, and this Court having held that the trial court properly ruled that unanimous consent of stockholders of South Western was required under the State law for the sale of its franchises and properties to the reorganized Central, we will not assume that either the Interstate Commerce Commission or the United States Supreme Court would hold that the Commission would have the right to override and nullify the judgments of the State courts, which were held to have jurisdiction to determine the question presented, or that the South Western and its officers could thus avoid, circumvent, and nullify the adjudication of this question by the State Courts.'

"This judgment of the Supreme Court of Georgia, therefore, decided that it would require unanimous consent of South Western's stockholders to sell its properties and franchises to Central, and denied South Western's right to apply to the Interstate Commerce Commission under Section 5 (11) of the Interstate Commerce Act [Title 49, Sect. 5 (11), U. S. Code Annotated] for authority and approval of the acquisition of the properties of South Western by Central."

In this question petitioners seek to relitigate questions which have been determined adversely to them by the Federal Courts, before the return of the case to the state courts.

The amendments to the answer and intervention in the State Trial Court (Cert. Record 105-110), from which the question stems, speak of sub-section (f) of Section 77 of the Bankruptcy Act and Paragraph 11 of Section 5 of the Interstate Commerce Act.

Sub-section (f) of Section 77 of the Bankruptcy Act is Title XI, United States Code Annotated, Section 206 (f).

Paragraph 11 of Section 5 of the Interstate Commerce Act is Title 49, United States Code Annotated, Section 5, in the Pocket Part of 1948. Sub-section 5 (11) is at page 71 thereof.

When M. P. Callaway as Trustee of the property of the Central of Georgia Railway Company, on April 18, 1947, filed his suit in the Bankruptcy Court (United States District Court for the Southern District of Georgia) to enjoin the original plaintiff in this case (Benton) from prosecuting his suit, he alleged:

(a) In Paragraph 12 of the petition, the following:

> "By whom or under which conditions the railroads of South Western Railroad Company should be operated in that event is a question in which the public has an interest under the provisions of the Interstate Commerce Act, and **of which the Interstate Commerce Commission has exclusive jurisdiction.**" (Emphasis ours.)
>
> (Record, page 4.)

(Note: Wherever "record" is referred to, we mean the record in the Supreme Court of the United States in the case of Calloway et al. v. Benton et al., 336

U. S. 132. References to the present record will be referred to as Present Record or Certiorari record.)

(b) In paragraph 14:

"The question whether the railroads of South Western Railroad Company shall become a part of the reorganized system of railroads of a Debtor, is a question which is affected with a public interest, **as to which the Interstate Commerce Commission has exclusive jurisdiction in the first instance**, and of which this Honorable Court has exclusive judicial jurisdiction in connection with the confirmation and consummation of the Plan of Reorganization of the properties of the Debtor." (Emphasis ours.)

(Record, page 5.)

(c) In paragraph 15, he alleged:

"The Interstate Commerce Commission will shortly report to this Court the result of the balloting on the Plan of reorganization of the Debtor, and the Judge of this Court is then required to confirm or reject the Plan. Under Paragraph (f) of the Bankruptcy Act, it is provided '**Upon confirmation of the Plan,** the Debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the Plan, shall have full power and authority to and shall put into effect and carry out the Plan and the orders of the Judge relative thereto, under and subject to the supervision and the control of the Judge, the laws of any State or the decision or order of any Court to the contrary notwithstanding.' If, under the statutes of the State of Georgia, the South Western Railroad Company has no power to sell or to merge or consolidate its railroad properties with the reorganized Company, except by unanimous consent of its Stockholders (a legal proposition which petitioner denies), then and in that event this Honorable

Court has plenary power under the provisions of the Bankruptcy Act, to set aside any such alleged law or statute of the State of Georgia, if it interferes with or prevents the process of reorganization of the Debtor, over which this Court has exclusive jurisdiction. It is manifest that unanimous consent of the Stockholders could not be secured, and no such impractical consideration should be upheld or allowed to interfere with or defeat the reorganization plan in respect of the properties of South Western Railroad Company." (Emphasis ours.)

(Record, page 5.)

Benton, in answering the petition there, and particularly paragraph 15 thereof, said:

"Answering paragraph fifteen (15) of the complaint, this respondent avers that he is advised that the Interstate Commerce Commission has now reported to this Court the result of the balloting on the Plan, and that the Judge of this Court will on June 2, 1947, hold a hearing as to whether the Plan will be confirmed or rejected.

"The provisions of Section 77 (f) of the Bankruptcy Act are correctly quoted.

"The quoted language of the Act does not purport to authorize the Judge to disregard the laws of a State in passing upon the question of whether or not a plan of reorganization should be confirmed.

"If the quoted provisions of the Bankruptcy Act should be construed by the Court to authorize the Court to impair the obligation of the contract which this respondent and other stockholders of the South Western Railroad Company have with the State of Georgia by virtue of the charter of the South Western Railroad Company, such quoted portions would be

unconstitutional and void, being contrary to the provisions of the Fifth Amendment to the Constitution of the United States which provides that: 'No person . . . (shall) be deprived of life, liberty, or property without due process of law.' "

(Record, pages 18-19.)

When the State Court trial Judge, on April 18, 1947 granted the interlocutory injunction prayed for by the original plaintiff in this case, L. O. Benton, Jr., Merrel P. Callaway, as Trustee, then amended his petition in the Bankruptcy Court (District Court of the United States for the Southern District of Georgia), calling attention of the Court to the injunction so granted, and praying:

"(a). That this Court will adjudicate the question whether, under the laws of the State of Georgia under the circumstances of this case, unanimous consent of the Stockholders of South Western Railroad Company, is a condition precedent to the acceptance of said Plan of Reorganization by South Western Railroad Company, and the consummation of said Plan by the conveyance of its property to the reorganized Company; and that if it is the law of Georgia that unanimous consent of stockholders is necessary in the premises, that this Court as a Court of Bankruptcy, under the powers conferred on it by the Bankruptcy Acts, and under the relevant provisions of the Interstate Commerce Act, both of which Acts are superior to State laws within their respective domains will declare and decree that under said Acts, in the interest of reorganization and in the interest of the public, that South Western Railroad Company may accept and consummate the said Plan of Reorganization by a conveyance of its property to the reorganized Company, notwithstanding any such law of the State of Georgia, and that any such law is super-

seded by the provisions of said Federal Acts and is of no force and effect in the premises;

"(b). That the order passed April 24, 1947, by the Judge in the suit in the Superior Court of Bibb County (Exhibit 'A' hereto) may be annulled and be adjudged to be null and void, and that if and when the Plan of Reorganization of the Debtor is confirmed, such orders may be passed in the premises as will make effective the acceptance and consummation of said Plan by South Western Railroad Company, its officers and Directors."

(Record, page 24.)

After the hearing in the Bankruptcy Court, the Federal District Judge made Findings of Fact, upon which he entered Conclusions of Law.

In the Findings of Fact he called attention to the following provision in the Plan:

" 'That nothing herein contained shall be, or be construed as, a grant of authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation, or merger of the debtor's property, or pooling of traffic, pursuant to either the Bankruptcy Act or the Interstate Commerce Act, until further action by this Commission upon confirmation of the plan by the Court.' "

(Record, page 47.)

In his Conclusions of Law, the Federal District Judge said:

" 'The judicial process in Bankruptcy proceedings under Section 77 is, as it were, brigaded with the administrative process of the Commission.' 'The judicial functions of the Bankruptcy Court and the ad-